

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KEVIN SO, ) Case No. CV 08-03336 DDP (AGRx)  
)  
Plaintiff, ) **ORDER DENYING (1) DEFENDANTS'**  
) **MOTION TO DISQUALIFY PLAINTIFF'S**  
v. ) **COUNSEL AND (2) PLAINTIFF'S**  
) **MOTION FOR RULE 11 SANCTIONS**  
)  
LAND BASE, LLC; UNIVEST )  
FINANCIAL SERVICES, INC.; ) [Motion filed on May 7, 2010, and  
BORIS LOPATIN, individually ) June 11, 2010]  
and d/b/a BORIS LOPATIN ) [Docket Numbers 345 and 397]  
ASSOCIATES and CHARLES W. )  
WOODHEAD, )  
)  
Defendants. )  
\_\_\_\_\_ )

This matter comes before the Court on Moving Defendants'<sup>1</sup>  
Motion to Disqualify Plaintiff's Counsel and on Plaintiff's Motion  
for Rule 11 Sanctions. Moving Defendants argue that Plaintiff's  
counsel should be disqualified due to their former representation  
of the defendant Lucy Lu ("Lu"), who has not joined in the motion.  
Plaintiff's counsel has moved for Rule 11 sanctions against Moving  
Defendants for filing the disqualification motion. For the reasons  
set forth below, the Court DENIES both motions.

---

<sup>1</sup>Moving Defendants are Kevin R. Kondas, Mira Meltzer, KM&A Associates International, LLC, KB&M Projects International, LLC, and CTL Projects International, LLC.

1 **I. Background**

2 In 2004, Boras Lopatin of Land Base, LLC, introduced the  
3 plaintiff Kevin So ("Plaintiff") and Defendant Lu to the Private  
4 Placement Project, a purported investment opportunity that  
5 Plaintiff alleges was actually a Ponzi scheme. (Pl.'s Opp'n 4:10-  
6 12.). In 2005, Plaintiff invested \$30 million in the Private  
7 Placement Project managed by Defendant Michael Brown and Defendant  
8 5th Avenue Partners ("5th Avenue"). (Defs.' Mot. 3:12-15.) Lu  
9 served as Plaintiff's representative in dealings with Land Base,  
10 Brown, and 5th Avenue. (Id. 3:15-17.)

11 Plaintiff has participated in several lawsuits to recoup his  
12 lost investment. (Id. 2:15-17.) In one such lawsuit, HSBC Bank PLC  
13 sued Michael Brown and 5th Avenue for fraud in London in 2005  
14 ("U.K. Litigation"). (Id. 2:23-3:6.) Plaintiff and Lu, among  
15 others, were named parties in the U.K. litigation, and Lu served as  
16 a witness in a related criminal proceeding against Brown and 5th  
17 Avenue in London. (Id. 3:7-9.) In the U.K. Litigation, investors  
18 in the Ponzi scheme- including Plaintiff and Lu- were represented  
19 by Nicholas Vineall, James Bowling, and Bivonas Ltd. ("U.K.  
20 Solicitors"). (Id. 3:20-21.)

21 The U.K. Solicitors retained an American attorney, former  
22 judge Leonard Suchanek ("Suchanek"), who was assisted by Defendant  
23 Mira Meltzer. (Id. 4:5-9.) In October 2007, the American law firm  
24 Kalbian Hagerty LLP ("Kalbian Hagerty") joined in the litigation  
25 efforts at Suchanek's suggestion. (Id. 4:12-13.) Suchanek secured  
26 Kalbian Hagerty's engagement on October 17, 2007, by assuring the  
27 firm that joint representation of Plaintiff and Lu was proper  
28 because their interests were completely aligned. (Pl.'s Opp'n

1 6:22-26.) On October 19, 2007, James Hagerty ("Hagerty") flew to  
2 London to meet with Plaintiff and returned on October 21, 2007,  
3 without having met Lu. (Id. 7:4-8.) After Kalbian Hagerty's own  
4 investigation revealed ethical conflicts posed by the simultaneous  
5 representation of Plaintiff and Lu, the firm sent a letter on  
6 November 1, 2007, terminating the firm's representation of Lu in  
7 the U.K. Litigation. (Id. 7:9-20.)

8 Kalbian Hagerty presently represents Plaintiff in this action.  
9 Moving Defendants filed this motion to disqualify Plaintiff's  
10 counsel on the grounds that Kalbian Hagerty's prior representation  
11 of Lu in the U.K. Litigation bars the firm from representing  
12 Plaintiff in this action in which Lu is a defendant.

## 13 **II. MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL**

### 14 **A. Legal Standard**

15 "The requirements for Article III standing, necessary for any  
16 party to seek relief from a federal court, are that the party have  
17 personally suffered an 'injury in fact,' which is causally related  
18 to the conduct in issue and redressable by a favorable decision of  
19 the court." Colyer v. Smith, 50 F. Supp. 2d 966, 968 (C.D. Cal.  
20 1999) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61  
21 (1992)). Standing doctrine also "embraces several judicially self-  
22 imposed limits on the exercise of federal jurisdiction, such as the  
23 general prohibition on a litigant's raising another person's legal  
24 rights . . . ." Allen v. Wright, 468 U.S. 737, 751 (1997). In the  
25 context of a disqualification motion, the "majority view is that  
26 only a current or former client of an attorney has standing to  
27 complain of that attorney's representation of interests adverse to  
28 that current or former client." Coyler, 50 F. Supp. 2d at 969. In

1 the leading case on point, In re Yarn Processing Patent Validity  
2 Litig., 530 F.2d 83, 88 (5th Cir. 1976), the Fifth Circuit held  
3 that "[a]s a general rule, courts do not disqualify an attorney on  
4 the grounds of conflict of interest unless the former client moves  
5 for disqualification." See also, e.g., O'Connor v. Jones, 946 F.2d  
6 1395 (8th Cir. 1991) (holding prison inmate lacked Article III  
7 standing to move to disqualify the state's retained counsel). "To  
8 allow an unauthorized surrogate to champion the rights of the  
9 former client would allow that surrogate to use the conflict rules  
10 for his own purposes where a genuine conflict might not really  
11 exist." Id. at 90.

12 However, "where the ethical breach so infects the litigation  
13 in which disqualification is sought that it impacts the moving  
14 party's interest in a just and lawful determination of her claims,  
15 she may have the constitutional standing needed to bring a motion  
16 to disqualify based on a third-party conflict of interest . . . ."  
17 Coyler, 50 F. Supp. 2d at 971. Because courts also have the  
18 inherent power to control the conduct of attorneys practicing  
19 before them, another exception to the general rule against third-  
20 party standing may exist when the ethical violation is so "manifest  
21 and glaring" or "open and obvious" that it "confront[s] the court  
22 with a plain duty to act." In re Yarn Processing, 530 F.2d at 88-  
23 89.

24 A breach of the attorney's duty of confidentiality to a former  
25 client "is not a legally cognizable interest" of a third party  
26 "because the only injury that results from the breach of  
27 confidentiality is personal to" the former client. Coyler, 50 F.  
28 Supp. 2d 966. Likewise, the argument that a breach of

1 confidentiality "will increase [the third party's] chances of  
2 losing the lawsuit" is too abstract to be legally cognizable. Id.  
3 These standing requirements guard against "the strategic  
4 exploitation of the rules of ethics long disfavored by the Courts."  
5 Id. (citing Optyl Eyewear Fashion Int'l v. Style Cos., 760 F.2d  
6 1045, 1050 (9th Cir. 1985)). "The cost and inconvenience to  
7 clients and the judicial system from misuse of the rules for  
8 tactical purposes is significant. Because of this potential for  
9 abuse, disqualification motions should be subjected to  
10 'particularly strict judicial scrutiny.'" Optyl Eyewear, 760 F.2d  
11 at 1050 (quoting Rice v. Baron, 456 F. Supp. 1361, 1370 (S.D.N.Y.  
12 1978)).

### 13 **B. Analysis**

14 Moving Defendants argue that Kalbian Hagerty's former  
15 representation of Lu in the U.K. Litigation provides Plaintiff with  
16 an "unfair tactical advantage" and "undoubtedly places these  
17 Defendants at a disadvantage when the time for trial arrives."  
18 (Defs.' Mot. 10:16-21.) Plaintiff argues that Kalbian Hagerty did  
19 not actually represent Lu and that even if it did, Moving  
20 Defendants lack standing to move for disqualification. Assuming  
21 for the sake of argument that Kalbian Hagerty represented Lu, the  
22 Court agrees that Moving Defendants' lack standing to move for the  
23 firm's disqualification.

24 The claim that Khalbian Hagerty's representation of Lu will  
25 provide Plaintiff with a tactical advantage in this lawsuit is not  
26 legally cognizable, as every litigant has a general tactical  
27 interest in prevailing in the litigation. Coyler, 50 F. Supp. 2d  
28 at 973. In addition, any potential breach of confidentiality

1 affects only Lu's rights, and not the Moving Defendants' interests.  
2 Id.

3 In addition, neither of the two potential exceptions to the  
4 general rule against third-party standing for disqualification  
5 motions applies. Kalbian Hagerty became engaged in the U.K.  
6 Litigation through Lu's counsel Suchanek and was not directly  
7 contacted by Lu regarding this representation. (Hagerty Decl. ¶  
8 12-16.) During the two week period that Kalbian Hagerty  
9 represented Lu, from October 17, 2007 to November 1, 2007, the  
10 firm's attorneys only spoke and emailed with Lu once. (Pl.'s Opp'n  
11 8:1-9.) Kalbian Hagerty contends that during this brief period the  
12 firm never received any confidential information regarding Lu and  
13 that Suchanek only provided the firm with court papers, witness  
14 statements, and legal documents regarding efforts to obtain liens  
15 on Michael Brown's assets. (Hagerty Decl. ¶ 33.) Kalbian  
16 Hagerty's own investigation led to the firm's quick realization  
17 that joint representation of Plaintiff and Lu would be unethical  
18 given Suchanek and Lu's misrepresentations and the firm proceeded  
19 quickly to terminate its representation of Lu. Given the very  
20 limited scope and duration of any representation of Lu, the Court  
21 finds that this conduct is not so "manifest or glaring" as to  
22 confront the court with "a plain duty to act." In re Yarn  
23 Processing, 530 F.2d at 88-90. Nor does Kalbian Hagerty's brief  
24 representation of Lu so "infect[] the litigation" as to "impact[]  
25 the moving party's interest in a just and lawful determination of  
26 [their] claims . . . ." Coyler, 50 F. Supp. 2d at 971.

27 Since the local firm Miller Barondess did not formerly  
28 represent any of the defendants in this case and Kalbian Hagerty's

1 actions are insufficient to infect the overall fairness of the  
2 litigation, disqualification of Miller Barondess is also  
3 inappropriate.

4 Accordingly, the Court DENIES Moving Defendants' Motion to  
5 Disqualify Kalbian Hagerty and Miller Barondess.

6 **III. PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS**

7 Plaintiff's Motion for Rule 11 Sanctions asserts that  
8 Defendants' Motion to Disqualify Kalbian Hagerty is frivolous and  
9 was filed for the improper purpose of harassing Plaintiff, delaying  
10 the adjudication of his claims, and needlessly increasing  
11 litigation expenses.

12 **A. Legal Standard**

13 Federal Rule of Civil Procedure 11 permits sanctions against a  
14 party and his or her counsel for filings papers with the court that  
15 are: 1) legally or factually baseless from an objective  
16 perspective; and 2) demonstrate counsel's lack of a reasonable and  
17 competent inquiry before signing and filing the document. Fed. R.  
18 Civ. P. 11(b); Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th  
19 Cir. 2002). To survive a charge of frivolousness, the pleader  
20 "must have a 'good faith argument' for his or her view of what the  
21 law is, or should be. A good faith belief in the merit of a legal  
22 argument is an objective condition which a competent attorney  
23 attains only after 'reasonable inquiry.'" Zaldivar, 780 F.2d at  
24 831.

25 A district court may also impose Rule 11 sanctions for papers  
26 filed frivolously or for an improper purpose. Fed. R. Civ. P.  
27 11(b)(1)-(2); G.C. & K.B. Investments, Inc. v. Wilson, 326 F.3d  
28 1096, 1109 (9th Cir. 2003). Filing papers with the court to harass

1 opposing counsel, cause unnecessary delay, or needlessly increase  
2 the cost of litigation constitutes an improper purpose. Fed. R.  
3 Civ. Pro. 11(b)(1). Sanctions for papers filed frivolously or for  
4 an improper purpose are governed by the objective reasonableness  
5 standard, based on the conduct of a competent attorney admitted to  
6 practice before the district court. Zaldivar v. City of Los  
7 Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986).

8 Rule 11 sanctions are designed to "reduce frivolous claims,  
9 defenses or motions and to deter costly meritless maneuvers,  
10 thereby avoiding delay and unnecessary expense in litigation."  
11 Christian, 286 F.3d at 1127 (internal quotation omitted). "The  
12 court may sanction counsel for making a motion to disqualify  
13 opposing counsel where no evidence or facts are presented  
14 justifying the motion." In re Marvel, 251 B.R. 869, 871 (Bankr.  
15 N.D. Cal. 2000). "To be justified, a motion to disqualify must be  
16 based on present concerns and not concerns which are merely  
17 anticipatory and speculative." Id. Attorneys cannot "avoid the  
18 sting of Rule 11 sanctions by operating under the guise of a pure  
19 heart and empty head." Zuniga v. United Can Co., 812 F.2d 443, 452  
20 (9th Cir. 1987).

### 21 **B. Analysis**

22 The Court concludes that Moving Defendants had a good faith  
23 argument for filing the Motion to Disqualify, that the motion was  
24 not filed for an improper purpose, and that there is no basis for  
25 sanctions.

26 Under an objective standard of reasonableness "[t]he key  
27 question in assessing frivolousness is whether a complaint states  
28 an arguable claim - not whether the pleader is correct in his



1 perception of the law." Hudson v. Moore Bus. Forms, Inc., 836 F.2d  
2 1156, 1159 (9th Cir. 1987). Defendants had proof of Kalbian  
3 Hagerty's engagement as Lu's attorney during the U.K. Litigation  
4 before filing the disqualification motion. Contra Adriana Int'l.  
5 Corp. v. Thoeren, 913 F.2d 1406, 1416 (9th Cir. 1990) (permitting  
6 Rule 11 sanctions for a motion to disqualify counsel when there was  
7 no factual evidence of prior representation). While a non-client  
8 must make a strong showing in order to establish standing to raise  
9 a disqualification motion, two exceptions may exist that permit  
10 third-party standing. See In re Yarn Processing, 530 F.2d at 88-90  
11 (finding an exception when ethical violations are "manifest and  
12 glaring" or so "open and obvious [which] confronted the court with  
13 a plain duty to act."); Colyer, 50 F. Supp. 2d at 971 (noting an  
14 exception when "the ethical breach so infects the litigation in  
15 which disqualification is sought that it impacts the moving party's  
16 interest in a just and lawful determination of her claims.").  
17 Therefore, the Defendants' proof of Kalbian Hagerty's former  
18 representation of Lu, combined with the lack of Ninth Circuit  
19 precedent on non-client standing, provided Moving Defendants with a  
20 reasonable basis for filing the disqualification motion. The fact  
21 that "one argument or sub-argument in support of an otherwise valid  
22 ... paper is unmeritorious does not warrant a finding that the  
23 motion or pleading is frivolous ...." Golden Eagle Distrib. Corp.  
24 v. Burroughs Corp., 801 F.2d 1531, 1541 (9th Cir. 1986).

25       Additionally, it does not appear that Moving Defendants  
26 brought forth the Motion to Disqualify solely for the improper  
27 purpose of harassing Plaintiff and his counsel, delaying the  
28 adjudication of Plaintiff's claims, and needlessly increasing

1 litigation expenses. Plaintiff argues that the fact that the  
2 motion was filed so late in this litigation evidences a malicious  
3 intent sufficient to warrant Rule 11 sanctions. However, as Moving  
4 Defendants' point out, Lu was added as a defendant to this suit in  
5 the First Amended Complaint filed on January 1, 2009, but has not  
6 submitted to the Court's jurisdiction and has not participated in  
7 the defense against Plaintiff's claims. On April 19, 2010, in  
8 response to discovery requests, Kalbian Hagerty produced the firm's  
9 privilege log, which asserted that certain communications to which  
10 Lu was a party were privileged. After contacting Lu and verifying  
11 her former attorney-client relationship with Kalbian Hagerty,  
12 Defendants filed the Motion to Disqualify on May 7, 2010, eighteen  
13 days after obtaining the privilege log and approximately four and a  
14 half months prior to the postponed trial date of September 21,  
15 2010. Lu's lack of participation in the case hindered Moving  
16 Defendants' ability to conclusively prove former representation by  
17 Kalbian Hagerty. Therefore, there is simply insufficient proof  
18 that Moving Defendants' filed the disqualification motion with an  
19 intent to harass or delay warranting Rule 11 sanctions.

20 **III. Conclusion**

21 For the reasons set forth above, the Court DENIES Moving  
22 Defendants' Motion to Disqualify and DENIES Plaintiff's Motion for  
23 Rule 11 Sanctions.

24 IT IS SO ORDERED.

25  
26  
27 Dated: August 4, 2010

  
DEAN D. PREGERSON  
United States District Judge